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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 103

ALBERT F. CONN, ROBERT D. FLYNT AND WILLIE E. NELSON, PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 48–61) is reported at 68 F. Supp. 966.

JURISDICTION

The judgment of the Court of Claims was entered on December 2, 1946 (R. 61). A motion for new trial, filed by petitioners on January 30, 1947, was overruled on March 3, 1947 (R. 61). The petition for a writ of certiorari was filed on May 26, 1947. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTION PRESENTED

Whether the War Department and the Civil Service Commission exceeded the authority granted by federal overtime-pay statutes and executive orders in classifying firemen, civil service employees of the War Department who were working on a two-platoon work schedule, as intermittent or irregular workers to be paid, in addition to their basic pay, the statutory compensation "in lieu of overtime" authorized for such workers.

STATUTES AND REGULATIONS INVOLVED

The pertinent portions of the Joint Resolution of December 22, 1942, 56 Stat. 1068, the War Overtime Pay Act of May 7, 1943, 57 Stat. 75 (50 U. S. C. App., Supp. V, 1401), Executive Order 9289 of December 26, 1942 (7 Fed. Reg. 10897), and the regulations of the Civil Service Commission and the War Department promulgated pursuant thereto are set forth in the Appendix, *infra*, pp. 17–27.

STATEMENT

At all times material to this suit, petitioners were civil service employees of the United States, with salaries fixed on a per annum basis (R. 20). They were continuously employed, from the dates of their respective hirings[1] through June 30, 1945, as civilian fire fighters at the United States Army Air Base, Gulfport, Mississippi (R. 20). Except

[1] Petitioner Conn began work September 24, 1942; petitioner Nelson began work July 17, 1943; and petitioner Flynt began work February 17, 1944 (R. 20).

for the 12-month period ending June 30, 1944,[2] the tours of duty of all civilian fire fighters at the Gulfport Air Base, including petitioners, were based on the two-platoon system whereby the work-week was divided into two alternate shifts of 24 consecutive hours each (R. 38). During the same period,[3] petitioners received, in addition to their regular salaries, monthly compensation "in lieu of overtime" authorized for intermittent or irregular workers by applicable federal overtime pay statutes.

The present suit was instituted by them in the court below to recover additional overtime compensation. Primarily, petitioners contended that they were improperly classified as intermittent or irregular workers and should have been classified as employees whose entire shift, under the two-platoon system, was compensable working time. In addition, they sought to have their claimed additional overtime compensation calculated by a formula other than that authorized by the applicable federal overtime statutes. The facts may be summarized as follows:

During the periods for which they seek overtime compensation, *i. e.*, while working under the

[2] From July 1, 1943, to June 30, 1944, petitioners' tours of duty were fixed at 8 hours a day for six days a week and no claim is here involved for overtime pay during that period (R. 39).

[3] Petitioner Conn's claim covers the periods December 1, 1942, to June 30, 1943, and July 1, 1944, to June 30, 1945 (R. 44); the claims of petitioners Flynt and Nelson cover the period July 1, 1944, to June 30, 1945, (R. 45, 47).

two-platoon system, petitioners were attached to the "crash station," so designated because it was the primary duty of firemen stationed there to provide fire-fighting services necessary in connection with fires in aircraft and fires or hazards created by crash landings (R. 38).[4] Their hours of duty were 6 P. M. to 6 P. M. on each shift (R. 39). Their activities consisted of the regular routine duties performed around the fire station,[5] and their duties incident to aircraft fires (R. 39–42). The court below found that the hours during each tour of duty when petitioners were actually engaged in working were intermittent and irregular (R. 41); it concluded from all the evidence that petitioners were actually working a total of 77 hours in each bi-weekly period, or an average of $38\frac{1}{2}$ hours per week (R. 50–51).[6]

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[4] The fire fighters at the other stations on the Base were classified as "structural" fire fighters because their principal duties consisted of fighting fires in buildings (R. 38).

[5] In addition to their fire fighting activities petitioners duties consisted of keeping their station and the surrounding grounds clean, cleaning and polishing equipment, checking and maintenance of equipment, repairing fire extinguishers, and routine inspection tours. A regular course of instruction, in which the fire fighters spent one or two hours each day, was offered. In addition two members of the crew of the "crash station" were on watch duty at all times. The "watch" duty was alternated by the firemen. (R. 40.)

[6] It was found that the time required in the performance of petitioners' duties, aside from fire fighting, varied from day to day and from week to week according to the conditions at the Base, but averaged approximately eight hours per day (R. 40). During the remaining periods of their tours of duty petitioners were required to remain on the Base in the vicinity

From December 1, 1942, to June 30, 1943, and from July 1, 1944, to December 31, 1944,[7] the War Department classified petitioners, for overtime pay purposes, as employees whose hours of duty (time devoted to actual work) were intermittent and irregular (R. 20). They were duly paid their basic annual compensation plus additional sums as monthly compensation in lieu of overtime compensation (R. 43–47). Their classification as intermittent or irregular employees and the determination of their rates of pay were made pursuant to the Joint Resolution of December 22, 1942, Appendix, *infra*, pp. 17–18, the War Overtime Pay Act of May 7, 1943, Appendix, *infra*, pp. 21–22, and the Executive Order and departmental regulations promulgated in accordance therewith (R. 20). Subsequent to December 31, 1944, petitioners were classified for overtime pay purposes under amended regulations as having an administrative work week of 56 hours (R. 20). Petitioners' hourly rates of pay, for the purpose

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of their station, and to hold themselves in readiness to respond to alarms (R. 39). A period of one hour per day was allowed for eating the two meals which were served at the station (R. 39–40), and the hours from 10 p. m. to 6 a. m. each day were designated as rest periods during which petitioners were free to sleep in the facilities provided, subject to their being called out to fight fires or perform other necessary work (R. 40–41). It was the general rule that when the sleep of the firemen was interrupted for fire fighting work, they were allowed to sleep later the following morning, or some of their routine duties would be cancelled for that day (R. 41).

[7] See note 2, *supra*, p. 3.

of computing overtime compensation, was determined in accordance with the formula set forth in the Joint Resolution of December 22, 1942, and the War Overtime Pay Act, Appendix, *infra*, pp. 17–18, 21–22, by which the annual rate of pay is divided by 360 to determine the daily rate and the resulting figure is then divided by 8 to determine the hourly rate of pay (R. 48).[8]

[8] Petitioners were paid the following sums for the indicated work periods (R. 43–47):

Period	Basic annual compensation	Monthly compensation in lieu of overtime and monthly* overtime compensation	Hours of duty in excess of 40 hours per week
Conn:			
Dec. 1, 1942 to Dec. 31, 1942	$1,500.00	$12.50	137
Jan. 1, 1943 to Jan. 30, 1943	1,680.00	14.00	1,076
July 1, 1944 to Dec. 31, 1944	2,040.00	25.50	901½
Jan. 1, 1945 to June 30, 1945	2,100.00	*75.82	964
Flynt:			
July 1, 1944 to Oct. 15 1944	1,680.00	25.00	514
Oct. 16, 1944 to Dec. 31, 1944	1,860.00	25.00	351
Jan. 1, 1945 to June 30, 1945	1,860.00	*67.16	1,069
Nelson:			
July 1, 1944 to Dec. 31, 1944	1,860.00	25.00	770
Jan. 1, 1945 to June 30, 1945	1,860.00	*67.16	960

From Dec. 1, 1942, to June 30, 1943, Conn was paid additional compensation in lieu of overtime equal to 10 percent of his monthly compensation; from July 1, 1944, to Dec. 31, 1944, he was paid additional compensation in lieu of overtime equal to 15 percent of his monthly compensation; from Jan. 1, 1945, to June 30, 1945, he was paid overtime compensation at the rate of one and one-half times his hourly rate for an average of 16 hours overtime per week (R. 43). From July 1, 1944, to December 31, 1944, Flynt and Nelson were paid additional compensation in lieu of overtime equal to $300 per year; from Jan. 1, 1945, to June 30, 1945, they were paid overtime compensation at the rate of one and one-half times their hourly rate for an average of 16 hours of overtime per week (R. 45–47).

Section 1 of the Joint Resolution December 22, 1942,[9] Appendix, *infra,* pp. 17–18, provided that employees whose hours of duty were intermittent or irregular or less than full time should be paid additional compensation, in lieu of overtime compensation, a sum equal to 10 percent of their earned basic compensation not in excess of $2,900. Section 7 of Executive Order No. 9289 of December 26, 1942, 7 Fed. Reg. 10897, Appendix, *infra,* pp. 18–19, directed, in part, that employees "whose work (as determined by the head of the department or agency concerned) requires them to remain at or within the confines of their posts of duty for more than 40 hours per week but does not require that all of their time be devoted to actual work * * * be considered to have intermittent or irregular hours of duty within the meaning of section 1 of * * * Senate Joint Resolution 170 * * *" (R. 23). War Department Orders U, December 26, 1942, Appendix, *infra,* pp. 19–21, specifically included fire fighters in the class of employees considered to have intermittent or irregular hours of duty (R. 23–25). Similar provisions were contained in Section 3 of the War Overtime Pay Act, Appendix, *infra,* pp. 21–22, and the War Overtime Pay Regulations of the Civil Service Commission of May 8, 1943, 8 Fed. Reg. 6149, Appendix,

[9] Prior to this resolution the existing pay statutes did not grant the right of overtime pay to civilian employees such as petitioners (R. 48–49).

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infra, pp. 22–24, which were issued pursuant to that Act (R. 25–29).[10] Fire fighters were again specifically included in the class of employees considered to be intermittent or irregular employees for purposes of overtime compensation by War Department Civilian Personnel Regulation No. 80 of December 15, 1943, Appendix, *infra*, pp. 24–25, which superseded Orders U, *supra*, p. 7 (R. 29–34). On January 4, 1945, the Civil Service Commission amended its War Overtime Pay Regulations and provided that the administrative work week for those employees rendering "stand-by service" at or within the confines of their stations included the total number of duty hours per week less time allowed for sleep and meals. 10 Fed. Reg. 772. Appendix, *infra*, pp. 25–26 (R. 34–35). War Department Civilian Personnel Circular No. 13 of January 25, 1945, Appendix, *infra*, pp. 26–27, contained a similar provision (R. 35–37).

As stated above, petitioners instituted the instant actions in the Court of Claims on the theory

[10] Section 3 (a) of the Act provided that employees whose hours of work were intermittent or irregular be paid in lieu of overtime $300 per annum if their earned basic compensation was at a rate of less than $2,000 per annum, or 15 per cent. of their earned basic compensation not in excess of $2,900, if their earned basic compensation was at a rate of $2,000 per annum or more (R. 26–27). Section 20.7 of the War Overtime Pay Regulations defined intermittent or irregular employees as employees whose work required them to remain at their posts of duty for more than 40 hours per week but did not require that all of their time be devoted to actual work (R. 28).

that the entire time covered by their shifts under the two-platoon system, which averaged 84 hours per week, were hours of employment within the intent and meaning of the Joint Resolution of December 22, 1942, and the War Overtime Pay Act (R. 1–18, 52–53). The Court of Claims rejected this theory, held that petitioners were not entitled to recover overtime compensation in excess of the amounts which had been allowed and paid them for the periods involved (R. 52), and accordingly dismissed the petition (R. 61).

ARGUMENT

Petitioners seek to recover overtime compensation for an asserted work week of 84 hours. They argue that to allow this claim is merely to carry out the intention of Congress, which, they contend, has been thwarted by the adoption of departmental orders and regulations. In support of their claim petitioners assert that the opinion of the court below is in conflict with *Armour & Co.* v. *Wantock,* 323 U. S. 126; *Skidmore* v. *Swift & Co.,* 323 U. S. 134; *Rokey* v. *Day & Zimmerman,* No. 994, Oct. T. 1946, certiorari denied, March 31, 1947; *Bell* v. *Porter,* No. 993, Oct. T. 1946, certiorari denied, April 7, 1947; and *Bowers* v. *Remington Rand, Inc.,* No. 995, Oct. T. 1946, certiorari denied, March 31, 1947 (Pet. 12–15); and that the method used in the calculation of the sums which they were paid in lieu of overtime conflicts with the method used in *United States*

v. *Townsley*, 323 U. S. 557. We submit that petitioners' claims lack substance, and that, contrary to petitioners' suggestion (Pet. 16–17), the case was correctly determined by the court below. Moreover, the petition presents no question requiring decision by this Court.

1. As the court below pointed out, petitioners' contention, that the entire time covered by their regular tours of duty were hours of employment within the intent and meaning of the Joint Resolution of December 22, 1942, and the War Overtime Act, is based on a false premise (R. 52–53).[11] While those Acts provided overtime compensation for certain classes of employees "for employment in excess of forty hours," they also specifically provided that employees whose hours of employment were considered to be intermittent or irregular were to be paid a bonus as additional compensation in lieu of overtime compensation (R. 53–

[11] Earlier Acts which provided for the payment of overtime compensation to certain employees of the Navy Department, the Coast Guard, the War Department, and the Panama Canal (Act of June 28, 1940, 54 Stat. 678; Act of October 21, 1940, 54 Stat. 1205) stated that "employment in excess of forty hours in any administrative workweek" was to be computed "at a rate not less than one and one-half times the regular rate" (R. 21). Petitioners contend that this proviso was, by reference, carried into the Joint Resolution of December 22, 1942, and the War Overtime Pay Act and therefore covered the entire time included in their regular tours of duty (R. 53).

55). The Executive Order and departmental regulations which were promulgated pursuant to these Acts (see *supra,* pp. 5–8), and which classified petitioners as intermittent or irregular employees, merely restated this explicit Congressional intention.

Petitioners contend that it was the intention of Congress to provide for the payment of overtime compensation. It does not follow, however, that Congress intended to direct the computation of overtime compensation based on the total hours of duty for employees such as fire fighters, lighthouse keepers and forest rangers, the nature of whose employment required them to remain at their posts of duty for extended periods of time, but did not require that their entire duty periods be devoted to actual work. Quite to the contrary, Congress specifically recognized that the nature of the work of certain classes of employees did not readily lend itself to an overtime pay program. Thus, Senate Report 1847, 77th Cong., 2d sess., which accompanied S. J. Res. 170 (which became the Joint Resolution of December 22, 1942), stated that employees, whose hours of duty were intermittent or irregular and thus could not readily be included in an overtime pay program, were to be paid additional compensation in lieu of overtime

in an amount equal to 10 per cent. of their basic salary not in excess of $2,900.[12] By contemporaneous executive constructions of the Act, petitioners were considered to be included in this latter group of employees (see *supra*, pp. 5–8). Great weight is to be given this construction of the statute, which will not be overturned unless clearly wrong. See *United States* v. *Jackson*, 280 U. S. 183, 193.

It is clear that had Congress felt that this construction of the Joint Resolution of December 22, 1942, was inaccurate, it had an early opportunity to correct it since the Joint Resolution expired by its own terms on April 30, 1943.[13] Yet identical coverage was written into Section 3 (a) of the War Overtime Pay Act of 1943 for intermittent and irregular workers, together with a formalized power in the Civil Service Commission to issue necessary regulations (Section 9).

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[12] This report read in pertinent part (at p. 2): "Provision is made for the payment of additional compensation to certain employees, the nature of whose work does not readily lend itself to an overtime pay program. Such additional compensation would amount to 10 percent of so much of an employee's salary as does not exceed a rate of $2,900 per annum * * *. Included in this category would be employees * * * whose hours of duty are intermittent, irregular, or less than full time * * *."

[13] S. Rep. 1847, *op cit.*, described S. J. Res. 170 as a temporary expedient, and stated that the date of April 30, 1943 had been selected in order to permit the Civil Service Committee to continue its study of the problems involved with a view to making additional recommendations early in the new Congress. *Ibid.*, p. 2.

The legislative history of the 1943 statute is devoid of any suggestion that Congress disagreed with the prior administrative construction of the Joint Resolution of which Congress had been apprised [14] in classifying petitioners' group as intermittent or irregular workers. It thus may be assumed that the reenactment without material change of a provision of a statute constituted legislative approval of the prior administrative construction. See *Helvering* v. *Wilshire Oil Co.*, 308 U. S. 90, 99.

Arguing that there "* * * is no substantial difference between the cases here and those decided under the Fair Labor Standards

[14] Congressional knowledge of the administrative interpretation of the Joint Resolution of December 22, 1942, is evidenced by Executive Order No. 9289, Appendix, *infra*, pp. 18–19; War Department Orders U of December 26, 1942, Appendix, *infra*, pp. 19–21; and the following explanation by Mr. Edgar B. Young of the Bureau of the Budget to Senator Mead during the hearings on S. 635 (78th Cong. 1st Sess.) which was later enacted as the War Overtime Pay Act of 1943:

"Mr. YOUNG. As I understand it, the Senator was pointing his question solely to those groups, the nature of whose work was such that they could not work overtime, and it had no reference to the overtime group.

* * * * *

"Again, I point out that the large group of bonus payments occur in the Postal Service, and there are only a scattered number who would receive it among the balance of the Federal employees, and the largest single group who would receive any benefit or payment under that clause would be in the War Department, where the fire fighters, guards, and so forth, are covered." (Hearings before a Sub-Committee of the Committee on Civil Service, United States Senate, 78th Congress, 1st Session, on S. 635, pp. 35–36.)

Act * * *" (Pet. 15), petitioners rest heavily on this Court's decisions in *Armour & Co.* v. *Wantock*, 323 U. S. 126, and *Skidmore* v. *Swift & Co.*, 323 U. S. 134 (Pet. 12–14). The *Wantock* and *Skidmore* cases held that the waiting time of privately employed firemen was compensable time within the meaning of the Fair Labor Standards Act. But the dispositive issue here is not one of compensation but of classification of government employees. Petitioners have received the proper compensation "in lieu of overtime" which, as stated above, Congress specifically provided for federal employees the nature of whose work did not lend itself to a conventional overtime pay program.[15] Nor is there anything in the *Wantock* or *Skidmore* decisions, nor in the other Fair Labor Standards Act cases

[15] There is no merit to petitioners' contention that the court below should have employed the formula for determining hourly rates of pay approved in *United States* v. *Townsley*, 323 U. S. 557. Since petitioners were classified as intermittent or irregular workers, there was no question of computing hourly rates of pay. The formula for computing compensation "in lieu of overtime" was prescribed for such workers by the war overtime pay statutes. See footnote 8, *supra*, p. 6. Moreover, for Federal employees entitled to overtime compensation for work in excess of 40 hours per week, the war overtime pay statutes specifically provided that in "determining the overtime compensation of per annum Government employees the pay for one day shall be considered to be one three-hundred-and-sixtieth of the respective per annum salaries" (R. 59). The Act of March 28, 1934, 48 Stat. 522, involved in the *Townsley* case, contained no such statutory formula.

referred to by petitioners, which limits or invalidates the classifications of federal employees made administratively under the 1942 and 1943 federal overtime statutes here involved. Concededly, governmental employment policy sought to conform, insofar as feasible, to the national policy established for private industry by the Fair Labor Standards Act. Pursuant to this policy, the Civil Service Commission changed petitioners' classification on January 4, 1945, the change stated to be "* * * in accord with two recent decisions * * * dealing with a similar situation in industry under the Fair Labor Standards Act * * *", citing the *Wantock* and *Skidmore* cases (R. 34–35). But this change in classification cannot bear the weight which petitioners seek to place upon it. It was not compelled nor was it made to "* * * correct the previous erroneous classification * * *", as petitioners contend (Pet. 14). It constituted merely an exercise of the power of classification under the 1942 and 1943 statutes. The change was not retroactive and did not invalidate the prior classification of petitioners as "intermittent or irregular workers". The court below correctly recognized the administrative power to classify specific groups of employees by "necessary and proper regulations" and refused to set aside the regulations here involved as "clearly beyond the authority conferred * * *" (R. 57).

CONCLUSION

The decision of the Court of Claims is clearly correct, there is no conflict, and the case does not warrant further review. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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JULY 1947.

APPENDIX

The Joint Resolution of December 22, 1942 (56 Stat. 1068) provides in part as follows:

> The joint resolution entitled "Joint resolution extending the period for which overtime rates of compensation may be paid under certain Acts", approved July 3, 1942, is amended by striking out "November 30, 1942," and inserting "April 30, 1943": *Provided,* That the authorization contained herein to pay overtime compensation to certain groups of employees is hereby extended, effective December 1, 1942, to all civilian employees in or under the United States Government, including Government-owned or controlled organizations (except employees in the legislative and judicial branches), and to those employees of the District of Columbia municipal government who occupy positions subject to the Classification Act of 1923, as amended: *Provided further,* That such extension shall not apply to (a) those whose wages are fixed on a daily or hourly basis and adjusted from time to time in accordance with prevailing rates by wage boards or similar administrative authority serving the same purpose, (b) elected officials, (c) heads of departments, independent establishments and agencies, and (d) employees outside the continental limits of the United States, including Alaska, who are paid in accordance with local prevailing native wage rates for the area in which employed: *Provided further,* That overtime compensation authorized herein and under the Act approved February 10, 1942 (Public Law Numbered 450, Seventy-seventh Congress),

and section 4 of the Act approved May 2, 1941 (Public Law Numbered 46, Seventy-seventh Congress), as amended, shall be payable only on that part of an employee's basic compensation not in excess of $2,900 per annum, and each such employee shall be paid only such overtime compensation or portion thereof as will not cause his aggregate compensation to exceed a rate of $5,000 per annum: *And provided further*, That officers or employees whose compensation is based on mileage, postal receipts, fees, piecework, or other than a time period basis or whose hours of duty are intermittent, irregular, or less than full time, substitute employees whose compensation is based upon a rate per hour or per day, and employees in or under the legislative and judicial branches, shall be paid additional compensation, in lieu of the overtime compensation authorized herein, amounting to 10 per centum of so much of their earned basic compensation as is not in excess of a rate of $2,900 per annum, and each such employee shall be paid only such additional compensation or portion thereof as will not cause his aggregate compensation to exceed a rate of $5,000 per annum.

* * * * *

SEC. 4. This joint resolution shall take effect as of December 1, 1942, and shall terminate on April 30, 1943, or such earlier date as the Congress by concurrent resolution may prescribe.

Executive Order No. 9289 (7 F. R. 10897) provided in part:

Section 2. Overtime compensation for employment in excess of 40 hours during an officially established regular work-

week, and for work ordered or approved in addition to the regular workweek so established shall be paid at the rate of one and one-half times the employee's regular rate of compensation, subject to the following limitations:

(a) No overtime compensation shall be paid on any part of an employee's basic rate of compensation in excess of $2,900 per annum;

* * * * *

For the purpose of computing overtime compensation the pay for one hour shall be considered to be 1/8 of the employee's pay for one day and the pay for one day shall be considered to be 1/260 of the employee's per-annum salary.

Section 7. Employees such as certain forest-fire lookouts, forest guards, and lighthouse keepers the nature of whose work (as determined by the head of the department or agency concerned) requires them to remain at or within the confines of their posts of duty for more than 40 hours per week but does not require that all of their time be devoted to actual work shall be considered to have intermittent or irregular hours of duty within the meaning of the last proviso of section 1 of the said Senate Joint Resolution 170, 77th Congress.

War Department Orders U, December 26, 1942, provide in part:

4. * * *

c. Method of computing.

(1) Overtime compensation of employees paid on an annual basis, for employment in excess of 40 hours during the regular 48-hour weekly tour of duty, will be calculated on an annual basis and paid in equal amounts at the regular pay periods. The

annual rate of overtime pay is obtained by multiplying the overtime day rate by 52, the number of regular overtime days during the year. Thus an employee paid a basic salary of $1,800 per annum will be paid, when in a pay status, for a full semimonthly pay period, the regular salary of $75 plus $16.25, or $91.25, less appropriate deductions. The overtime compensation is in addition to the regular rate of pay and is computed at the rate of time and one-half of the regular rate of pay, the regular daily rate being $\frac{1}{360}$ of the basic annual rate.

(2) Overtime compensation for approved work beyond the 48-hour weekly tour of duty will be computed by the hour—the hourly overtime rate being $\frac{1}{360}$ of the basic annual rate, divided by eight, multiplied by $1\frac{1}{2}$—and will be paid in addition to the basic salary and overtime for the regular weekly tour of duty.

* * * * *

9. Employees whose compensation is based on mileage, fees, piece-work, or other than a time period basis or whose hours of duty are intermittent, irregular, or less than full time (in this instance, a "less than full time" employee is one employed on a part-time basis for less than 42 hours per week in the departmental service, and less than 40 hours in the field service), and who are not subject to section 23, Act of March 28, 1934 (48 Stat. 522); the Act of July 2, 1940 (Public Law 703, 76th Congress); or Executive Order No. 8848, will be paid additional compensation at the rate of 10 percent provided the salary paid does not exceed a rate of $2,900 per annum, excluding the 10 percent. Employees paid salaries

exceeding a rate of $2,900 per annum but not over $5,000, will be paid the 10 percent additional compensation on a rate of $2,900 per annum, but the aggregate of salary and additional compensation paid at any one time will not exceed a rate of $5,000 per annum. The ceiling rates listed in paragraph 4*b* (2), and the provisions of paragraph 4*f*, will apply.

a. Employees such as firefighters who because of the nature of their work are required to remain at or within the confines of their posts of duty for more than 40 hours per week, but who are not required to devote all their time to actual work, will be considered to have intermittent or irregular hours of duty and are subject to the provisions of this paragraph.

The War Overtime Pay Act of 1943, 57 Stat. 75 (50 U. S. C. App., Supp. V, 1401) provides in part:

* * * * *

SEC. 3. (a) Except as provided in subsection (c), officers and employees to whom this Act applies and whose hours of duty are intermittent or irregular, officers and employees in or under the legislative and judicial branches (except those in the Library of Congress, or the Botanic Garden, and per annum employees in or under the Office of the Architect of the Capitol who are regularly required to work not less than forty-eight hours per week) to whom this Act applies, and, subject to the approval of the Civil Service Commission, officers and employees whose hours of work are governed by those of private establishments which they serve and for whom on this account overtime work schedules are not feasible, shall be paid, in lieu of the overtime compensation authorized under

section 2 of this Act, additional compensation at the rate of (1) $300 per annum if their earned basic compensation is at a rate of less than $2,000 per annum, or (2) 15 per centum of so much of their earned basic compensation as is not in excess of a rate of $2,900 per annum if their earned basic compensation is at a rate of $2,000 per annum or more.

* * * * *

SEC. 9. The Civil Service Commission is authorized and directed to promulgate such rules and regulations as may be necessary and proper for the purpose of coordinating and supervising the administration of the provisions of the foregoing sections of this Act insofar as such provisions affect employees in or under the executive branch of the Government.

* * * * *

The War Overtime Pay Regulations of the Civil Service Commission of May 8, 1943 (8 F. R. 6149) provide in part:

* * * * *

20.4 FULL-TIME EMPLOYEES. Full-time employees are employees who are regularly required to work, as a minimum, the number of hours in the administrative workweek specified for employees in their respective groups.

20.7 INTERMITTENT OR IRREGULAR EMPLOYEES. Intermittent or irregular employees who are not regularly required to work a specified minimum number of hours. Employees whose work requires them to remain at, or within, the confines of their posts of duty for more than forty hours per week, but does not require that all of their time be devoted to actual

work, may be considered to be intermittent or irregular employees, or in the discretion of the head of the department or agency concerned, may be considered to be full-time employees having such administrative workweek as is specified by such head.

* * * * *

20.12 COMPUTATION OF OVERTIME COMPENSATION. Overtime compensation shall be paid at a rate of one and one-half times the employee's regular rate of compensation computed as provided in this section: *Provided, however,* That when the overtime compensation for any pay period is less than a rate of $300 per annum, in lieu of such overtime compensation, there shall be paid the employee an additional amount equal to either (a) a rate of $300 per annum or (b) 25% of the employee's earned basic compensation for the pay period, whichever is less, but this proviso shall not be construed to reduce the overtime compensation to which the employee is entitled by virtue of actual overtime employment. In determining whether an employee shall be eligible for additional compensation in lieu of overtime compensation, leave without pay during any pay period shall not be construed as reducing the rate of overtime compensation.

The computation of overtime compensation shall be subject to the following conditions.

(a) HOURLY RATES AND DAILY RATES. For employees paid at an annual rate, the daily rate shall be considered to be $\frac{1}{360}$ of the annual rate, and the hourly rate shall be considered to be $\frac{1}{8}$ of the daily rate.

(b) MAXIMUM BASE FOR COMPUTATION. Overtime compensation shall be paid only upon such portion of the basic rate of com-

pensation of an officer or employee as does not exceed $2,900 per annum.

* * * * *

20.14 INTERMITTENT, IRREGULAR, AND OTHER EMPLOYEES. Intermittent and irregular employees and, subject to the approval of the Civil Service Commission, employees whose hours of work are governed by those of private establishments which they serve and for whom, on this account, overtime work schedules are not feasible, shall be paid, in lieu of overtime compensation, additional compensation at a rate of (a) $300 per annum if their earned basic compensation is at a rate of less than $2,000 per annum or (b) 15 per centum of so much of their earned basic compensation as is not in excess of a rate of $2,900 if their earned basic compensation is at a rate of $2,000 per annum or more, subject to the limitation in § 20.17 of this chapter.

War Department Civilian Personnel Regulation No. 80 of December 15, 1943 provides in part:

* * * * *

3–1. (3) *Full time employees.*—Those employees who are regularly required to work an established weekly tour of duty of 48 hours, and, with the approval of the commanding general of the appropriate force or his designated representative, those classes of employees at any installation who regularly work a minimum number of hours set by proper authority at more or less than 48 hours, but not less than 40, per week.

* * * * *

(7) *"On call" employees.*—Employees whose work requires them to remain at, or

within the confines of, their posts of duty more than 40 hours per week, but does not require that all of their time be devoted to actual work (for example, fire-fighters on duty 24 hours and off duty 24 hours).

* * * * *

3–7. *a* (2) Other intermittent and irregular employees, "on call" employees, "when actually employed" employees (including experts and consultants appointed under the provisions of the Military Appropriations Act of 1944 at a per diem rate on a "when actually employed" basis (23 Comp. Gen. 17)), and employees serving private establishments for whom overtime work schedules are not feasible shall be paid, in lieu of overtime compensation, additional compensation at a rate of 25 percent of earned basic compensation, if such compensation is at a rate of less than $1,200 per annum; $300 per annum, if earned basic compensation is at a rate of $1,200 per annum or more but less than $2,000 per annum; 15 percent of so much of earned basic compensation as is not in excess of the rate of $2,900 per annum, if earned basic compensation equals or exceeds the rate of $2,000 per annum.

b. Intermittent or irregular employees who are paid additional compensation at a rate of $300 per annum shall be paid $\frac{1}{360}$ of $300 for each day in a pay status.

The amended War Overtime Pay Regulations of the Civil Service Commission of January 4, 1945 (10 F. R. 772) provide in part:

20.3 Administrative work-week for full-time employees. (a) The administrative work-week for each group of full-time employees shall be the minimum number of

hours of work per week specified by the general public regulations issued by the head of a department or independent establishment pursuant to section 2 of the Act of March 14, 1936, 49 Stat. 1161, 5 U. S. C. 29a, and in accordance with applicable circulars of the Bureau of the Budget.

(b) In the case of employees whose work includes periods during which they are required to remain on duty and render "stand-by service" at or within the confines of their stations, the administrative workweek, for the purposes of the regulations in this part shall be the total number of regularly scheduled hours of duty per week (or in rotating-shift systems, the average number of regularly scheduled hours of duty per week for the cycle), including all such "standby" or "on call" time except that allowed by regulation of the department or independent establishment for sleep and meals. Effective January 1, 1945.

War Department Civilian Personnel Circular No. 13 of January 25, 1945, provides in part:

2. On-call employees are those employees who are required to remain at or within the confines of a designated post of duty for more than 40 hours a week for the purpose of rendering stand-by service, but who are not required to spend all of their tour of duty in the actual performance of work. A notable example of on-call employees are fire fighters who are on duty 24 hours and off duty 24 hours, or whose tour is a variation of this form of the two-platoon system. * * *

3. Not later than 1 April 1945 the tours of duty for all on-call employees will be fixed upon one of the following bases:

a. Twenty-four hours on duty followed by 24 hours off duty, thus completing a total of 168 hours of duty in a biweekly period.

* * * * *

4. The employees referred to in paragraph 3*a* * * * will be considered as working 16 hours within the spread of each 24 hours daily tour of duty. The other 8 hours of the tour will be considered as the amount of time spent in stand-by service during which the employee is free to eat or sleep. No action will be taken to set aside a specific portion or portions of the tour for this purpose and there is no change in the present requirement that employees be present for duty or in a leave-with-pay status during the full tour in order to be eligible for full compensation. Rather, the employee will be considered as being on duty the total time, but the fact that a portion of the tour is not active duty will be recognized in computing overtime compensation. This arrangement results, in effect, in the establishment of an average workweek of 56 hours for the employees referred to in paragraph 3*a* and of 48 hours for the employees referred to in paragraph 3*b*. Regular prorated overtime compensation will be computed on the basis of the average workweek so established.

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